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Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

JUL 02 2003

File: WAC 01 277 58463 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of New Jersey in November 1999 and authorized to conduct business in California in September 2000. It is engaged in the operation of a franchise flower store. It seeks to employ the beneficiary as its chief executive officer. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer because the United States petitioner had only purchased a license to operate a franchise in the United States.

On appeal, counsel for the petitioner asserts that the beneficiary as owner of the foreign entity has ownership and control of the United States petitioner. Counsel asserts that the petitioner is independent from the franchisor in this case.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The issue in this case is whether the petitioner has established a qualifying relationship with the beneficiary's overseas employer.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:
>
> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The director incorrectly focused on the United States petitioner's purchase of a flower shop that is part of a franchise chain of flower shops. In this particular case, the franchise agreement and license are simply assets of a duly organized limited liability corporation. The franchisor/franchisee relationship is not between the United States petitioner and the beneficiary's overseas employer; instead, the franchisor/franchisee relationship is between the U.S. entity and a chain of flower shops. Thus, the director's reasoning in this regard is incorrect. Nonetheless, the petitioner has not established a qualifying relationship with the beneficiary's overseas employer.

The U.S. entity initially described itself as "the foreign subsidiary of [redacted] a company fully owned by [the

beneficiary] and [redacted], a company in which [the beneficiary] is a majority shareholder. [The petitioner] is fully owned by [the beneficiary]." The petitioner also provided a share certificate issued by it to the beneficiary stating that the beneficiary owned 100 percent of the petitioner's stock. The petitioner also provided 10 different numbered certificates of equity shares for [redacted] Each of the certificates appeared to designate the beneficiary as the holder of 500 shares. The petitioner also provided a document signed by accountants dated December 19, 2000 stating that the beneficiary held 60 percent of the shares in [redacted] The document reflected that two other individuals owned the remaining 40 percent.

The petitioner, in response to the director's request for evidence submitted copies of wire transfers and statements from third parties. The statements indicated that one third party owed money to [redacted] and, at the direction of [redacted] had paid the amount to the petitioner and to the beneficiary.

The U.S. entity stated that, prior to entering the United States to work for the petitioner, the beneficiary previously worked as the chief executive officer of [redacted] and had also worked as a director at [redacted] In response to the director's request for evidence showing the foreign entity continued to do business, the petitioner submitted photographs of [redacted] and the telephone directory listing for [redacted] company.

The record does not provide consistent and conclusive evidence of the petitioner's qualifying relationship with the beneficiary's overseas employer. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

The conflicting facts are:

- The beneficiary appears to have primarily worked as Precision Engravers' sole proprietor before entering the United States to work for the petitioner.

- On one hand, the wire transfers and statements from third parties imply that Precision Engravers, the beneficiary's sole proprietorship, partially funded the petitioner. On the other hand, funds paid directly to the beneficiary appear to have capitalized the petitioner as well.

- The foreign entity apparently continues to conduct business, thus, maintaining the petitioner's multinational status. The overseas entity is, however, a separate entity in which the beneficiary claims majority ownership. Despite this claim, the record fails to demonstrate that the beneficiary, in fact, owns a majority interest in the separate entity, namely, [redacted] Specifically, the petitioner did not provide sequential stock certificates to establish actual distribution of shares of [redacted] Moreover, an accountant's statement is insufficient to verify the actual ownership and control of a separate entity.

- Finally, the record fails to establish that [redacted] employed the beneficiary; instead, the record shows only that the beneficiary served as one of the company's director.

In sum, the record presents a conflicting summary of the relationships between the petitioner and the beneficiary's claimed overseas employer(s). The petitioner has not demonstrated that a qualifying relationship exists between the petitioner and the beneficiary's overseas employer. The record does not demonstrate that the beneficiary's previous overseas employer continues to conduct business, thus maintaining the multinational aspect of the petitioner and the beneficiary's previous employer.

Beyond the decision of the director, the petitioner has not established that it has been doing business for one year prior to the filing of the petition in August 2001 as required by 8 C.F.R. § 204.5(j)(3)(i)(D). The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

The petitioner, in response to the director's request for Internal Revenue Service (IRS) tax returns, stated that "although [the petitioner] was incorporated in November 1999, it did not commence business until 2001." The petitioner confirms by this statement that the petitioner was not engaged in the regular, systematic, and continuous provision of goods and/or services for one year prior to filing the petition.

In addition, the petitioner has not established its ability to pay the beneficiary the proffered wage of $50,000 per year.

The regulation at 8 C.F.R § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner provided its IRS Form W-2, Wage and Tax Statement issued to the beneficiary for the year 2001. The IRS Form W-2 indicated that the petitioner paid the beneficiary $17,734.50 for the year 2001. The petitioner did not provide federal tax returns, audited financial statements, or annual reports to otherwise establish the petitioner's ability to pay the beneficiary the proffered wage of $50,000 per year.

Further, the petitioner has not established that the beneficiary's overseas position was in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
>
> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> iv. exercises discretion over the day-to-day operations of the activity or function for which the

> employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily-
>
> i. directs the management of the organization or a major component or function of the organization;
>
> ii. establishes the goals and policies of the organization, component, or function;
>
> iii. exercises wide latitude in discretionary decision-making; and
>
> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner provided an overview of the beneficiary's duties as the chief executive officer of [redacted] basically paraphrasing elements contained in the above definitions. The petitioner neither provided a comprehensive description of the beneficiary's daily duties for the beneficiary's claimed overseas employment, nor provided a comprehensive description of the beneficiary's duties for the foreign entity, [redacted] From the scant information in the record regarding the beneficiary's employment overseas, the Bureau cannot conclude that the beneficiary's employment was in a managerial or executive capacity.

For these additional reasons the petition will not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.